Answers

1 In the period running from Malta's ratification of the European Convention of Human Rights and Fundamental Freedoms to August 1987 when the European Convention Act, 1987 entered into force, the Convention did not form part of Maltese ordinary law. Nonetheless, even throughout these years, its impact, even though minimal, could still be felt.

The human rights provisions in both the 1961 and 1964 Malta Constitutions were based on Commonwealth Constitutions which, in turn, were based on the wording of the Convention. As remarked by the main compiler of our Constitution, the inspiration of the European Convention on Human Rights on Chapter IV of the Constitution of Malta is, to say the least, 'very obvious'. Thus, if one takes the political rights which both the Convention and the Constitution adopt, one notes that they are very similar in wording. Article 2, guaranteeing the right to life is identical to the local Article 34, except for the words an unlawful act of war. Article 4 of the Convention, relating to the protection from forced labour is also extremely similar to our Article 36, as are the derogations to Article 5 and reproduced in Article 35 of the Malta Constitution in relation to the right to liberty and personal security. This, however, does not mean that no differences exist between the two documents.

The European Convention Act, 1987, was an Act which rendered the European Convention on Human Rights an integral part of Maltese law. In view of the fact that our legal system is based on dualist principles, any international treaty cannot be said to form part of domestic law until it is domestically incorporated by an enabling law. This is, in fact, a legacy of British public law and an unwritten norm of Maltese law which will continue to hold water in terms of s.11 Malta Independence Order, 1964, unless and until this is repealed by the local Parliament. This point was clearly expressed, although with reference to a treaty other than the Convention on Human Rights, in the case *Charles Spiteri* v *Ministru tal-Bini Pubbliku u Xoghlijiet u d-Direttur tax-Xoghlijiet*.

There are two main ways in adoption of the European Convention Act, 1987 could be seen to have strengthened the protection of human rights in Malta. Incorporation of the Convention was essential and necessary, in that, it provided broader rights for the individual and also provided for the possibility that decisions awarded in Strasbourg be enforced locally, after satisfying the condition that prior to availing oneself of international recourse, all local remedies be exhausted. Therefore, not only were Maltese citizens afforded greater protection from the adoption of broader rights but also because they could now petition the Court in Strasbourg if they felt their rights were violated.

In order to place the Constitutional provisions and the Convention within their proper perspective it was submitted that the former contained the minimum, and not the maximum of rights which should be enjoyed. Thus, if a right, as entrenched in the Constitution, had a more limited extension than as expressed in the Convention, it should be the latter which prevails once this has become part of Maltese law. However, if a provision was spelt out in greater detail in the Constitution, then the latter should prevail. The principle adhered to should always be that the provisions with the more extensive definition should prevail. Should, however, an inconsistency or incompatibility arise, then it is beyond all doubt that, as the supreme law of the land, it is the Constitution which should prevail. In this manner, protection of the individuals' rights was to be increased but not at the cost of detracting from any of the power enjoyed by the organs of the Maltese State, unless subjecting the local Executive to international scrutiny be considered so.

The extension of rights could also be seen from the fact that aside from the European Convention Act affording protection to the main rights such as protection of right to life; protection from arbitrary arrest or detention; protection from forced labour; and protection from inhuman treatment; the Act provides protection to 'other rights provided for in the European Convention for the 'Protection of Human Rights and Fundamental Freedoms'.

When the European Convention on Human Rights was incorporated into ordinary law, the Maltese judiciary was entrusted with the added role of interpreting this instrument. Maltese judges now have the task of interpreting another piece of ordinary legislation drafted and drawn up by Parliament. However, although in view of the fact that the Convention was transformed into Maltese law, judges are bound to interpret and apply the enabling Act, they are nonetheless not bound by the decisions reached in other member States which have incorporated the Convention and neither by the decisions of the European Commission and Court.

Another important consideration which resulted from the incorporation of the Act and hence the incorporation of the Convention into Maltese law, the local courts have been vested with the task of interpreting an international instrument and keeping abreast with the decisions of the Strasbourg organs. This is especially so since its decisions can now be challenged in Strasbourg. Whilst this possibility of petitioning a European court on the same merits, as would have already been decided upon locally, can serve as a means to monitor local decisions, as noted earlier, there is nothing to prohibit the local judiciary from going beyond decisions of its European counterpart or in interpreting the European Convention on Human Rights in a different manner.

2 Contractual requisites can be classified into essential requisites, natural requisites and accidental requisites. It can be argued that only the essential requisites should be called requisites as they are required for the essence and validity of a contract. The other so-called requisites are, in actual fact, the effects rather than the requisites of a contract. Another distinction often made in relation to the requisites of a contract is between common requisites, which all contracts require, and particular requisites, which are proper to certain contracts only.

The common essential requisites may be internal and external. While the external requisites refer to the form of a contract, the internal requisites result from the very notion of a contract, namely agreement between the parties. Lawful consideration or *causa* and subject matter are two important internal requisites.

Much debate has taken place over the true nature of the requisite of *causa*. The most acceptable seems to be that which relates to the consideration of the reciprocal performance in the case of onerous contracts and the freedom to perform in the case of gratuitous contracts, as well as the unlawful motive which shall render any contract void.

In the case of *causa* in onerous contracts this is the consideration which makes the parties enter into the contract. Such a consideration may have already been effected at the time of the conclusion of the contract as in the case where a person binds themselves to return the thing which they have received on deposit. However the consideration may even be effected at a future date when it consists in a conditional performance, namely in the case of bilateral contracts.

In the case of gratuitous contracts, the party binding themselves does not stipulate any consideration in their favour and therefore in such a contract the intention of performing is a free act. This intention is therefore deemed of essence in order to determine when the *causa* of an obligation may be simulated or found to be false.

The nullity of obligations based on an unlawful *causa* is not sufficient to protect interests sanctioned by law. If it is correct to say that the obligation of the party to perform an unlawful act due to the remuneration is null as the object is unlawful, on the other hand, the obligation of the other party of paying the remuneration promised has no such unlawful object since payment of a sum of money is not in itself an unlawful act. It is true that so long as the obligation of performing an unlawful act is not fulfilled, and its fulfillment cannot be enforced, the obligation of paying the remuneration cannot be claimed because there is no *causa*. However on the other hand, the party who had promised the remuneration cannot invoke in their favour the inexistence of the corresponding performance if the unlawful act is effectively performed. Nonetheless it would be highly immoral to allow a person to demand remuneration for having performed an unlawful act or for having abstained from doing something which they were bound to do by reason of their office.

This leads one to distinguish between the unlawful *causa* and the inexistence of the *causa*. In the theory relating to the inexistence of *causa*, *causa* is deemed to refer to the immediate or direct scope which the party who binds themselves has in mind, and which is the same for all those who partake in contracts of the same nature. Therefore, for example every purchaser intends to purchase a thing while every seller intends to sell a thing and receive a sum of money for the thing sold. This would therefore exclude any possible motive which either party may have in mind and the possibility or otherwise of attaining the same.

On the other hand, in the theory relating to the unlawful *causa*, the *causa* refers to any unlawful scope which the parties may have in mind when they enter into a contract. In order to determine whether a contract may be annulled on this ground, one has to distinguish between the party who aims at an unlawful *causa* who cannot refuse to fulfil their obligation to the detriment of the other party who is in good faith. On the other hand, the right to demand the annulment of the contract must be granted to the party who, after the conclusion of the contract, becomes aware of the unlawful scope of the other party.

Causa may be inexistent either because it never existed or because it was related to some future event which never materialised or because it ceased to exist. *Causa* can be missing from the very beginning of the contract when the particular thing promised by one of the contracting parties does not exist at that moment or is *extra commercium* or when the promisor binds themselves not to perform a given act which had in fact already been performed, or when the promisor binds themselves to do something beyond human possibility, or when a person binds themselves due to the performance of an act which they believe already to exist when in fact there had been no such performance or pre-existing obligation.

Causa may also cease to exist after the conclusion of the contract, in which case the contract cannot be regarded as null. However, the fact that the obligation is not performed implies the inexistence of the consideration of one of the parties which would entitle the creditor of the consideration the right not to fulfil their part of the obligation. In this case the contract is null with regard to the party whose obligation is left without a consideration. In successive contracts, if the *causa* ceases to exist after the formation of the contract, the contract is dissolved for the future.

The Civil Code also deals with false *causa* whether this be due to error or to simulation. When the consideration stated is false, the agreement may nevertheless be upheld if another consideration is proved. Therefore falsity vitiates *causa* and also the contract if there is no true *causa*.

The object or subject-matter of a contract is that which is given rise to by means of the contract, and since the contract aims at creating, regulating or dissolving an obligation or at transferring a real right, it is this which should constitute the subject-matter of contracts.

Any thing may form the object of contracts, including the act of man whether positive or negative. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of a contract just as the thing itself. Even future things, such as future produce may form the object of a contract, and in this regard, we must distinguish according to whether the object which the parties have in mind is the future thing itself or merely an expectancy of the future thing.

As a rule, the object of contracts may be anything which is chosen by the parties, because just as the law protects and sanctions the liberty of the citizen in general, it also protects and sanctions this liberty in contracts. Any limitation therefore to the liberty of the contracting parties with regards to the object of the contract is only justified by the necessity of preventing an abuse of such liberty.

The requisites of the object of contracts are the same as those of the object of obligations in general. The object of contracts, therefore, must be possible, lawful, *in commercio*, specified or such that it may be specified, and useful to the creditor.

Possible means physically possible, so that a thing or an act which is physically impossible cannot form the object of a contract.

Lawful means morally, juridically and politically possible, that is, it must not be something which is prohibited by law, or contrary to morality, or to public policy. The latter include agreements and stipulations with regard to future successions, in that, they have for their object the future inheritance of a living person. The law has always regarded such agreements as immoral and it has therefore always prohibited them because it perceives in them the danger that they might kindle the desire of seeing the death of the person concerned accelerated. Any contract containing such an object is therefore void, whether it is the *decujus* who binds themselves to leave their property to a certain person or it is entered into by two or more persons different from the *decujus*, with or without their consent, such as if a legitimate heir or one who hopes to be a testamentary heir, renounces their inheritance in favour of a third party. However there are exceptions to this prohibition such as renunciations to future successions and certain contracts containing a promise of future succession made in contemplation of marriage and a renunciation to future succession made by a person joining monastic life.

The object of a contract must be in *commercio*, it must be apt to form part of the estate of an individual. Things *extra commercium* are those which are destined to be used in a way incompatible with trade; but as soon as such a destination ceases they become again *in commercio* and they may therefore form the object of a contract.

The objects of contracts must be specified because otherwise the debtor could easily evade their obligations by making an illusory performance. Such specification may refer either to a particular thing or to the class to which the object belongs. In the first case the object is said to be certain and determinate, in the second case the object is generic.

Finally, the object of the contract must be useful to the creditor as it is obvious that a person is never interested in the performance of an obligation which is not useful to them. This utility need not be material: a thing which is not useful in itself may have a sentimental value, but it must have at least an indirect influence on the estate of the person and be such that it may be valued in money. However, there is a tendency in foreign doctrine and case law to regard a moral interest in the thing which is the object of the contract as sufficient even if it cannot be valued in money.

3 The provisions of the Employment and Industrial Relations Act, 2002 (EIRA) regulates all types of employment relationships. It deals primarily with whole time employment, whole-time employees working on reduced hours and part time employees. A whole time employee is one who is deemed to be in whole-time employment by any recognised conditions of employment. On the other hand, a part-time employee is defined as an employee whose normal hours of work, calculated on a weekly basis or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours

The EIRA, however, also empowered the Minister to issue Regulations on certain employment issues, one of which is part-time employment, through the Part-Time Employees Regulations, 2002 (L.N. 427 of 2002, as subsequently amended).

The purpose of these regulations is:

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work, and

(b) to facilitate the development of part-time work and to contribute to the flexible organisation of working time taking into account the needs of employers and workers.

In the event that provisions in collective agreements and any other contract of employment or employment relationship entered into between the employer and the employee are more favourable than the ones contained in this Legal Notice (LN), such provisions shall apply.

This LN applies to all employees whose normal hours of work, calculated on a weekly basis or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours.

Provided that:

(a) when part-time employment is based on a variable time schedule, the weekly number of hours of work shall be the weekly average number of hours of work spread over successive 13 week periods commencing on 1 January of each calendar year; and

(b) when the employee has not been in part-time employment for a period of 13 weeks the average weekly number of hours of work shall be calculated over the number of weeks in employment.

Employers must ensure that part-time employees are not treated less favourably than comparable whole-time employees with regards to the terms of their contract of employment or by subjecting them to any other detriment by an act, or deliberate failure to act, of the employer solely because the employee works on a part-time basis, unless such different treatment is justified on objective grounds.

Furthermore, a part-time employee who is paid at a lower rate for overtime than a comparable whole-time employee is or would be paid in the same period shall not, for that reason, be regarded as treated less favourably than the whole-time employee if the total number of hours worked by the part-time employee in that period, including overtime, is less than the total number of hours that the whole-time employee is required to work in that same period.

If a part-time employee feels that they have been treated by their employer in a manner which is less favourable than a comparable whole-time employee as aforesaid, the employee may request the employer to provide them with a written statement containing the reasons for any such difference in treatment.

Specific provision is also made to the leave benefits for part-timers. A part-time employee whose part-time employment is:

(a) their principal employment, and

(b) employed in such part-time employment for not less than 20 hours a week, shall be entitled pro rata to –

(i) the minimum entitlement of all public holidays and annual vacation, leave, sick leave, birth leave, bereavement leave, marriage leave and injury leave applicable in terms of the recognised conditions of employment and to such other leave established by virtue of the Act; and

(ii) any entitlement to statutory bonuses and other income supplements to which comparable whole-time employees on similar duties with the same employer are entitled in terms of the recognised conditions of employment applicable to them.

If, however, the maximum number of hours permissible in terms of the recognised conditions of employment for a part-time employee is less than 20 hours a week, a part-time employee in such employment shall be entitled pro rata to the aforesaid benefits if the part-time employment is the principal employment of the employee and if the employee is employed for not less than 14 hours in any week.

All part-time employees who are employed in part-time employment, shall be entitled to participate in vocational training programs provided by or on behalf of the employer in the same manner as whole-time employees at the same place of work.

Furthermore, employers are to inform part-time employees about the availability of whole-time work opportunities, and whole-time employees about part-time opportunities to facilitate transfers from full-time to part-time or vice-versa within the same place of work. Such information is to be given in a timely manner in order to allow the employees to apply for the vacancy. Should an employee refuse to transfer from part-time to whole-time work and vice-versa this shall not in itself constitute a valid reason for termination of their employment.

A part-time employee shall be regarded as having been unfairly dismissed if the reason for the dismissal or the grounds for the dismissal are that the employee has:

(i) initiated proceedings against the employer under this Legal Notice;
(ii) requested from their employer a written statement of reasons for less favourable treatment;
(iii) given evidence or information in connection with such proceedings brought by any employee;
(iv) done anything under these regulations in relation to the employer or any other person;
(v) alleged that the employer had infringed these regulations; or
(vi) refused (or proposed to refuse) to forgo a right conferred on them by this Legal Notice.

Furthermore an employee shall be deemed to have been unfairly dismissed on the ground that the employer believes or suspects that the employee has done or intends to do any of the things mentioned above.

Any alleged breach of these regulations is to be determined by the Industrial Tribunal following the filing of the required complaint by the employee within three months, beginning with the date of the less favourable treatment or the alleged unfair dismissal.

4 Article 4 of the Companies Act, 1995 defines a commercial partnership as one of three, a partnership *en nom collectif*, a partnership *en commandite* or limited partnership, and a company. A commercial partnership, to the exclusion of a company, may be formed for the exercise of one or more acts of trade, while a company may be formed for any lawful purpose.

As commercial partnerships, partnerships *en commandite* and *en nom collectif* and companies are legal persons and therefore act through individuals. They are metaphysical entities with legal but no physical existence. As such they are not in a position to carry on the business for which they are established unless the representation and administration are vested in one or more persons who are to act for and on behalf and under their name, namely partners in the case of partnerships and directors in the case of companies.

The Act provides for the setting up, regulation and management of all three types of commercial partnerships as against civil partnerships which are regulated by the Civil Code. The Act, in dealing with companies, draws out a distinction between public and private companies. The presumption is that when one forms a company, one is actually forming a public company, unless one complies with those specific requirements relative to private companies.

It is to be noted that under the Companies Act this presumption exists, in that, unless the regulations of Part Two of the First Schedule are specifically adopted and unless it is stated that the company is to be a private company, then the presumption is that the company was to be a public company. More specifically, within the body of the Companies Act, it is provided that a private company is one which, besides fulfilling the requirements of the said law for it to hold the status of a private company, the company must also, by its memorandum or articles restrict the right to transfer shares; limit the number of its members to 50; and prohibit any invitation to the public to subscribe for any shares or debentures in the company. Thus, for a company to be an ordinary private company it must include all of the said three restrictions in its articles, either by adopting Part II of the First Schedule or by including such restrictions within its own registered articles. Furthermore, the law provides that a private company shall not offer to the public, whether for cash or otherwise, any shares in or debentures of the company or allot or agree to allot, whether for cash or otherwise, any shares in or debentures of the company, with a view to all or any of those shares or debentures being offered for sale to the public by means of a prospectus.

In terms of Article 51 of the Companies Act, a partnership *en commandite* operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners, called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution, of one or more partners, called limited partners: provided that at least one of the general partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members. Thus, the liability of the general partners in a partnership *en commandite* is similar to that of the partners in a partnership *en nom collectif*, that is, unlimited and joint and several.

Therefore, while a partnership *en nom collectif* only has general partners, a partnership *en commandite* has both limited and unlimited partners. On the other hand, a company is formed by means of capital divided into shares subscribed to by its members. Of importance is that the liability of the shareholders of a company is always limited to the unpaid part of the issued share capital.

5 The fundamental characteristic of corporate structures is that the company is a single entity distinct from its members. It is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. In view of this, a corporate personality is often described as an artificial person in contact with natural persons. Article 5 of the Companies Act, 1995 provides that a commercial partnership has a legal personality distinct from that of its members and shall continue to have such until the name of the partnership is struck off the register and shall therefore cease to exist. Insofar as when a company shall cease to have a separate personality, reference has to be made to the case *Dr Leslie Grech* v *Registrar of Partnerships* (1979), where the issue was whether the shareholders of a company that had gone into liquidation may resolve to bring that company out of its liquidation stage. While the court concluded that a resolution pulling the company out of liquidation could not be reached, it drew out an important distinction between the dissolution of a company and its striking off. During the course of the dissolution of a company it does retain its separate legal personality and it is only when the liquidation is concluded and the company is struck off the register that the company ceases to exist. On the other hand, one notes that in terms of the Companies Act, 1995, a partnership *en participation* is deemed not to have a legal personality distinct from that of its members.

It can be stated, without doubt, that corporate personality was most assimilated with companies as from the *Salomon* v *Salomon & Co Ltd* (1897) decision where a company, which consisted of a majority shareholder and his family each holding one share, was nonetheless considered to be at law a different person altogether from the members. The facts of the case were the following: Aaron Salomon was a boot manufacturer whose business expanded so much that he decided to form a company and transfer his business to that company to avoid personal liability. Initially the company was set up with the required number of shareholders with him, his wife and children holding 1 share each. Once his business was transferred to the company an additional 20,000 shares were issued to Salomon, also issued in his name were debentures for the amount of £10,000 and the balance was in cash amounting to £9,000. After some time the company met financial difficulties and the company was placed into liquidation. However a receiver was called in by the new debenture holder as it appears that in the meantime Salomon had transferred the debentures to a third party. While the debenture holder was paid there were many other creditors of the company which remained unpaid. The latter obviously sued for payment and also for indemnification.

It was contended that Salomon as the majority shareholder, was also the directing mind of the business and that actually there had been no changes in the business after the company was registered from that as it stood before registration. Therefore, the company was considered to be a sham. The First Court held that the transfer of business was actually a sham and that the company was a mere agent of Salomon. On the other hand, the House of Lords held that the Companies Act 1868 merely required that a company be registered with a minimum of seven members and that it did not require that the shareholding be equally spread. It was held that once the registration requirements in terms of law were complied with, then the fact that Salomon was the directing mind did not mean anything and that although after incorporation Salomon continued to carry out the same business as before and the same persons acted as members, shareholders and manager, they are not to be held liable for the debts of the company except to the extent of their unpaid share of the capital. Also, as opposed to the first court, the House of Lords concluded that Salomon was in fact the agent of the company and not the other way round.

The *Salomon* decision is said to have opened 'new vistas to company law' and can also be clearly be said to have established three main principles, namely the legality of the 'one man company', that the corporate structure could not only be used for large companies but could also be used in the case of small partnerships, and also that limited members could also further reduce their risk of loss from their investment by subscribing to debentures rather than to shares and should the company meet financial difficulties they are able to compete with the other creditors often also having a charge on the property of the company. There have been arguments both for and against this type of investment. Those in favour contend that when persons invest they do so freely, having the opportunity to view the accounts of the company and verify if there exist any charges on the assets of the company. Those who argue against this type of investment state that the accounts may not be timely enough to reflect the present state of affairs of the company and may not even exist as the requirement for their publication may not have been necessary under the Commercial Partnerships Ordinance. Notwithstanding the latter arguments investing through debentures is permissible under both local and UK law

This decision has over the years been the subject of great debate and often its underlying principles taken to extremes. Thus, in *Macaura* v *Northern Assurance Co* (1925), Macaura was the controlling shareholder of a company and took out fire insurance in his own name in respect of the property of the company. The House of Lords held that only the company had an insurable interest and therefore Macaura did not and could not claim on the policies. The only relationship he had was with the company and not with the timber which was owned by the company. Therefore the concept of separate personality separated the relationship between the shareholders and the assets of the company. A more humane application of the corporate personality was expressed in *Lee* v *Lee's Air Farming Ltd* (1960) where Lee as the controlling shareholder and sole director, but who also worked for the company, was held to be a separate person from the company and as such his family was able to make a claim upon his death which occurred in performance of work for the company. Lee had entered into a contract of employment with the company and in terms of such contract he was a party separate and distinct from his employer, the company. Turning to judgements of our local courts, one notes that there have been instances when the corporate personality doctrine has been upheld. Thus, in *Adelina Fenech et* v *Spiridione Mizzi*, the court held that when premises had been sub-let to a company, without the consent of the lessor, it could not be said that there had not been such sub-letting for this had been done in favour of a separate legal person, that is, a company. It is to be noted that the UK cases mentioned above were however followed by statutory changes which permit, in certain instances the peeping behind and the lifting of the corporate veil, and by various other judgements opposing the strict interpretation of such judgements.

Before proceeding further, it is interesting to analyse what are considered to be the real advantages of setting up a limited structure as opposed to those partnerships where liability may be unlimited and thus where the existence or otherwise of the separate legal personality of the structure as against its members poses no problem. The obvious advantage is that the liability of all the members is limited to their unpaid part of the capital and since today most capital is fully paid up on registration, their liability is almost immediately covered. One notes however that the law does provide for those cases where the company may turn on its members to discharge its obligations. Also worth noting is that usually the shareholders of small companies are not always free from personal liability as in most cases banks and other institutions which grant credit facilities require some form of personal guarantee from the members of the company. Thus, members can be said to be unlimitedly liable towards those creditors which do not require such guarantees, and from claims in tort where they were not the persons who carried out the tortious act. This notwithstanding, it is contended by many that the popularity of doing corporate business is not only related to the rule of limited liability but to other factors.

The first of such factors is the freedom enjoyed by members to freely transfer their shares. When a company is limited by shares, unless otherwise provided in the statutory documents of the company, the shares can be freely and easily transferred. In all cases however the transferee steps into the shoes of the transferor assuming all rights and obligations of the former in the company. Another obvious advantage of having a company is that it enables the property of the company to be kept separate and distinct from the personal property of the members constituting it. Similarly, when a company is sued or being sued, it is the company as a legal person which can take action to enforce a legal right and be sued for any breach. The only disadvantage which may arise is where the company is the plaintiff and may be ordered to give security for costs. A further obvious advantage is that of the perpetual succession of a company with it not being susceptible to 'the thousand shocks that flesh is heir to.'

Furthermore, while it may be thought that credit may more easily be attained by a private person, in view of the possibility that companies are able to give floating charges, in practice companies find it easier to obtain the facilities they may require. By virtue of a floating charge, the lender can obtain effective security on all the assets of the company, both present and future, either alone or in conjunction with a fixed charge on particular property. Another aspect to keep in mind is that certain jurisdictions offer favourable tax regimes to companies. Also worth noting is that in practice members try to reduce the company's taxable income by paying themselves directors' fees or other salaries thus reducing the taxable income of the company.

Moreover, the use of the corporate form is a useful means of spreading income amongst members of the family and for spreading ownership of wealth, in that, shares in a company are convenient gifts for wealthy relatives to the junior members of their family. A further advantage of incorporation is the possibility of organising a business which has grown beyond the control of the individual trader.

On the other side of the coin, members are said to be burdened by the incorporation formalities and costs, by maintenance of the company in terms of law and the costs relative thereto, and also by the loss of privacy. As held by Farrar, a proprietor of a solvent business owes no duties to anyone in respect of the control of his business, except for his duty to pay taxes and to comply with the law applicable in his regard, but on becoming incorporated and in all probabilities becoming a director, the said individual shall owe various duties to the company, including those of an administrative, managerial and fiduciary nature.

6 The reduction of share capital is a more complex procedure than the procedure for the increase in share capital principally due to the consequences which it could bring about. Since a reduction of the unissued authorised capital is deemed to be a diminution of share capital, it is submitted that we are here talking of the reduction of the issued share capital of the company. In the UK case of *Avery & Co* (1890), it was held that the power to reduce the capital of the company must be contained in the articles and thus it is not sufficient to provide for it only in the memorandum and if the articles do not so provide, then they must first be altered and then the procedure laid down in the law would have to be followed. It is submitted that the Companies Act, 1995 does not require that the reduction be authorised by the articles. In fact there is no regulation to this effect in the First Schedule. However, Article 83 lays down the procedure which must be followed.

It is clear that since a reduction in capital necessarily brings about an alteration to the memorandum of the company, an extraordinary resolution of the shareholders is required to put the reduction into effect. Where there are different classes of shares, the decision by the general meeting concerning a reduction in the issued share capital shall be subject to a separate vote for each class of shareholders whose rights are affected by the reduction, and for every separate vote taken the same majority shall be required as though the shares are not divided into different classes.

In view of the fact that the law lays down the minimum share capital with which public and private companies can be registered, any reduction of share capital whereby the share capital of the company shall be reduced below €1,164 in the case of private companies and €46,588 in the case of public companies shall be void to the extent that the capital is reduced below the said limits.

So as to avoid the situation whereby the company tries to reduce its share capital without following the procedure in the law by waiving the whole or part of the unpaid share capital of shares which have already been issued, the law provides that the total or partial waiving of the unpaid part of the issued shares and the release of the holders of those shares from their obligation to pay up that unpaid part shall, notwithstanding anything contained in the memorandum or articles of a company, in all cases be considered as a reduction in share capital.

The principal limitation provided at law in relation to the coming into effect of a reduction in capital is the time when such shall be deemed to come into effect. The law provides that notwithstanding the provisions of Article 79(3) (that a resolution shall take effect as soon as it is registered), where the alteration consists in the reduction of the issued share capital, any such reduction shall not take effect until three months from the date of the publication of the required statement in the Government Gazette relating to the resolution effecting such alteration.

If, during the said three months, a creditor of the company whose debt existed prior to publication objects to the reduction by writ of summons and shows good cause why it should not take effect, the court shall either uphold the objection or allow the reduction on sufficient security being given. This procedure is different from that existing in the UK where there is nothing equivalent to our three month period but instead the reduction must be confirmed by the court. This, it is submitted does not provide the creditors of the company with knowledge of what is going on and thus a creditor who was owed money by the company before the reduction could be severely prejudiced. Although the UK courts will not grant retrospective approval of the reduction, and this is a measure of control for the benefit of creditors, there is still the possibility that the reduction would not be brought to the knowledge of all the company's creditors as is the case when a notice of reduction is published in the Gazette.

The law provides one exception to the requirement that the reduction shall take effect after the lapse of three months from the publication of the notice in the Gazette. This is in the case of the offsetting of losses. In fact, if an alteration consists in the reduction of the issued share capital to offset losses incurred or to include sums of money in a reserve, this shall take effect immediately on the registration of the resolution concerning such a reduction. This shall be so subject to two conditions, namely, that, following this operation, the amount of such reserve is not more than 10% of the reduced issued share capital, and that, except in the event of a reduction in the issued share capital, any such reserve shall not be distributed to shareholders but shall be used only for offsetting losses incurred or for increasing the issued share capital by the capitalisation of such reserve. In these cases the amounts deriving from the reduction of the issued share capital may not be used for making payments or distributions to shareholders or to discharge shareholders from the obligation to pay calls on their shares.

7 A feature absent from both UK and local company legislation is provision for the promoter of a company. The term 'promoter' can be widely interpreted to include several persons and since this is not legislatively defined recourse has to be had to case-law. In one UK case, the judge defined it to include 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the purpose.' Since before its incorporation a company cannot be said to exist, there must be somebody to act on its behalf. In *Whaley Bridge Calico Printing Company* v *Green* (1879), the court was a bit more explicit when it was stated that the term 'promoter' was not a legal term but a business term, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. A more comprehensive definition was given in *Emma Silver Mining Company* v *Lewis & Son* (1879), where it was held that the duties of the promoter go further than the registration of a company, in that, after registration a promoter is held to owe fiduciary duties to the company.

From a review of UK case-law, it can be contended that the promoters stand in a fiduciary relationship with the company and the importance of this rule is seen in its consequences. It is held that there are three basic fiduciary duties which a promoter owes to the company, namely:

(a) A duty not to make, directly or indirectly, any secret profit at the expense of the company. However a profit is not considered secret if it is disclosed, which disclosure must be full, made either to an independent board of directors or to all the existing or proposed shareholders. Thus, the duty is not merely to refrain from making wilfully false statements but actively to disclose the whole truth and half-disclosure is sometimes no better than none. In *Gluckstein* v *Barnes* (1900), the promoters disclosed that they had purchased the property for £140,000 and were to sell it to the company for £180,000. However, apart from the profit they disclosed, they failed to disclose that they had also bought debentures well below par value, knowing that they would be repaid at par if the sale materialised. The court held that even such purchase should have been disclosed.

    Disclosure is deemed of utmost importance and possibly the only way in which the promoter may exonerate themselves from liability. Thus, if property is sold to the promoter *qua promoter* and the promoter is acting as agent for the vendors or for the other promoters they would still have to disclose any secret profits made once the company is formed. The same applies where a promoter wishes to sell their own property to the company.

(b) Once promotion of the company has started, the promoter must account to the company for the benefit of any subsequent contract for the acquisition of property which they intend to sell to the company, since this belongs in equity to the company which can insist on taking it at cost. Thus, where a promoter acquires property after they have commenced to promote the company and later sells it to the company, a question of fact is raised as to whether or not they acquired it as trustee for the company. At law there is no presumption that they did but one should look further than the mere wording of the relative contract. Even if this does not state that they are buying the property as trustee for the intended company, if in fact they purchase property with a view to getting the company formed to take it over, they are, in the eyes of the law, considered to be a promoter.

(c) A promoter must not exercise undue influence or fraud and must not hide their interest through nominees with unlawful intentions.

As the promoter is held to owe certain duties, then the company must be entitled to enforce compliance with such duties. Accordingly, it is held that the company's remedies are rescission, recovery of the secret profit and damages for breach of fiduciary duties or deceit. Rescission is an equitable remedy which involves the unscrambling of the contract and returning the consideration, which will, however, be lost either if the parties cannot be substantially restored to their original position, unless this is due to the fault of the promoter; or if third parties have acquired rights for value.

Under UK law, promoters do not owe fiduciary duties to shareholders and creditors in the absence of special facts giving rise to such a relationship which go beyond the ordinary aspects of promotion. The shareholders and creditors may, however, have actions at common law for deceit, misrepresentation or negligence.

It may be regarded that the only instance in which the local Companies Act, 1995 makes an indirect reference to the promoter is through the provisions of Article 74 which deals with the transfer of non-cash assets to a company. More specifically this provides that a company shall not acquire, within two years of its authorisation to commence business, any asset belonging to a person who subscribed the company's memorandum or who is a member of the company, for a consideration which is equivalent to at least one tenth of the issued capital of the company unless certain conditions are satisfied, including that the purchase be approved by ordinary resolution or that an expert has been appointed for valuation purposes.

Furthermore, a promoter is not entitled to recover any remuneration for their services from the company unless there is a valid contract to pay, between them and the company. Indeed without such a contract they are not even entitled to recover their preliminary expenses or the registration fees. In this respect, the promoter is at the mercy of the directors of the company. However, where agreement is reached, the promoter may receive such remuneration in a variety of ways. Thus, they may be given shares in the company either of substantial nominal value or shares having particular rights, as in the case of founder shares. At times the articles of association may provide that the directors will pay a specified sum to the promoters in respect of their services in promoting the company, but this is merely an authority and not a contract on the basis of which the promoter may sue the company.

In the light of the importance of the role of the promoter in the registration of virtually every corporate body it is questioned whether some form of protection should be afforded to such key role player and conversely whether some measures of protection and remedies be legislatively provided for under local company law. As noted earlier, the promoter may have incurred expenses and certainly spent time in attending to all registration procedures to ensure that the company is duly registered in terms of law. In the absence of an agreement with the prospective shareholders, the promoter may be left without any adequate compensation and therefore it may be suggested that provision be made in the law for such. Furthermore, if it be acknowledged that further to the nature of the activities which the promoter undertakes in respect of the company-in-formation, the promoter does in fact owe certain duties to the company and ultimately to the shareholders, provision for remedies which the company may take for breach of such duties should also be contemplated legislatively.

8 **(a)** If the creditors decide that they no longer wish to give further credit to Andrew's business they can take the necessary steps to place the company which Andrew set up to manage and operate the hotel, into liquidation. This would take the form of a creditors' voluntary winding up. One of the first steps which the creditors would need to do in this process is appoint a liquidator to look into the status of affairs of the business. Andrew would therefore cease in the exercise of his powers of a director and these powers would be taken over by the liquidator.

(b) The Companies Act, 1995 provides for two principal offences for which directors can be held liable in the case where the company continues to trade when in financial difficulties and such company is subsequently dissolved, namely fraudulent and wrongful trading. The main differing feature between the two offences is the intention to defraud which must be found to exist in order to hold a person liable for fraudulent trading.

Where it appears that a person who was a director (including a shadow director) and who knew, or ought to have known, prior to the dissolution that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency, such person shall be held liable for wrongful trading. This provision can be said to concern in principal two persons, namely the liquidator who has to bring forward the application before the court, and the director or directors against whom the action is brought.

On the other hand, if in the course of winding up, it appears that any business of the company has been carried on with the intent to defraud creditors of the company or any other person or for any fraudulent purpose, the court may declare that any persons who were knowingly parties to the carrying on of the business, be held liable for fraudulent trading.

While in the case of fraudulent trading an application can be made by the official receiver, the liquidator or any creditor or contributory of the company, in the case of wrongful trading action can only be taken by the liquidator.

On the basis of the given facts one is to consider what action can be taken against Andrew in his personal capacity. It appears that Andrew, rather than being fraudulent in his intentions, was hoping that his luck would turn around. Given his inexperience in the business he was unable to see that he needed expert help in running the business and that perhaps this would be the only way in which he would start making a profit and start paying creditors.

The principal issues that a liquidator must assess in considering a wrongful trading action are, first, whether, and precisely when, the director should have concluded that there was no reasonable chance of the company avoiding insolvent liquidation. UK cases seem to suggest that the courts take a broad approach to predict insolvency. On the assumption that the director has the financial information that would be available to them if the statutory accounting requirements are complied with, the director should be able to predict insolvent liquidation. Pinpointing the precise date at which the prediction should have been made is probably more difficult to establish. While a cashflow crisis on top of mounting losses and liabilities will lead to an inevitable conclusion, loss of a major customer or contract or the date on which disastrous accounting figures should have been available to the board indicating soaring debt and losses are close indications. However, insolvency is probably predictable long before a cash flow crisis leads to an actual failure to pay current debts.

Having verified that the company went into insolvent liquidation and that Andrew should have known that there was no reasonable prospect that the company would avoid dissolution due to insolvency, the liquidator need prove no more, for the burden of proof shifts on to Andrew to prove that there was no wrongful trading or that, knowing that the company could not avoid dissolution due to insolvency, he took every step to minimise the loss of the creditors.

For a director to know and be able to predict financial difficulties they should always have adequate financial information at their disposal, as for example, having monthly management accounts. From the given facts we cannot determine whether Andrew has the financial information at his disposal. However in view of the fact that creditors were chasing to be paid and Andrew asking for further credit sheds light on this matter and leads one to conclude that Andrew was aware of the financial problems being faced by his company.

When dealing with the liability of a director, in the case of wrongful trading, their conduct (that is, the facts which they ought to know or ascertain insofar as the insolvency is concerned, the conclusions which they ought to reach and the steps they ought to take to minimise the loss of the creditors) is made subject to two tests: the general knowledge, skill and experience a person carrying out their functions should objectively have and the general knowledge, skill and experience that they actually have. According to these standards they ought to keep themselves informed, reach conclusions as to the company's prospects, and take steps to minimise the loss of the company's creditors. The implications of this provision should not be underestimated, in that, it imposes an objective test, with a subjective element, on all directors especially when compared to the subjective criteria usually adopted in determining the level of skill and care expected of directors.

Liability for wrongful trading shall however not be imposed where the director, knowing that there was no reasonable prospect that the company would avoid being dissolved due to insolvency, took every step they ought to minimise the potential loss of the creditors of the company.

The course of action which a director may take in encountering financial difficulties would probably be commenced with trying to reach agreements with the major creditors and obtain supplies on credit from the small unsecured creditors. Those providing finance may request floating securities over the assets of the company together with high rates of interest which would assist the company in continuing to do business.

An alternative would be to cease trading, even though this may not necessarily be the best way to protect the creditors' interests. This would necessitate implementation of formal insolvency proceedings which should be done as soon as possible to prevent enforcement of debts by creditors starting proceedings for settlement, to minimise trading losses and to bring trading expenses, like wages, rent, purchases, to a minimum.

No similar action seems to have been taken by Andrew but if it be determined that he did take such similar action, such can be used as a defence by Andrew when an action for wrongful trading is taken against him.

(c) Where a person is held liable for wrongful trading the court may sentence them to make a payment towards the company's assets in such amount as the court thinks fit. As to the actual amount of the liability order, a UK case gives clear guidance. As the purpose is primarily compensatory, it is *prima facie* the amount by which the company's assets can be discerned to have been depleted by the director's conduct which amounted to wrongful trading. Thus, in simple terms the directors may be made liable to contribute the amount of the loss caused to the company after the time they should have predicted its demise, yet continued to trade.

In quantifying the amount of the order the court would also look to the position of the director themselves. In the above case, the court held that fraudulent intent, positive untruths stated to raise credit and ignoring warnings from auditors might all be factors influencing the amount of the order. Also as one director was older and more senior in every sense his contribution was to be greater than others. Therefore, an element of moral judgement is likely to form part of the court's discretion in establishing the amount.

A point which should be made insofar as the success or otherwise of a claim for wrongful trading is that although a director may be held liable and ordered to contribute an amount to the assets of the company, such would be futile where the directors do not have the means to make such contribution. The existence of directors' guarantees of bank lending and collateral security on their assets may often mean that the directors fail financially with the collapse of the company. This is where the possibility that the company cover the liability of its officers through adequate insurance policies gains importance; a possibility which also exists under local law.

9 (a) An offer, or proposal, is a unilateral act as it is made by the proposer to one or more contracting parties or to the public at large. It is the manifestation of the will and intention of one of the contracting parties to enter into an obligation with one or more parties. It is the first step in the creation of an obligation from which certain legal effects will ensue depending on whether or not the contract is ever concluded. Other than being unilateral, an offer is also indivisible, in that, it must be considered as a whole and therefore on the basis of the terms and conditions on which it is made.

In order for an offer to produce legal effects it must also be (i) externally manifested; (ii) made with the intention of binding the offeror; (iii) complete; and (iv) made to a particular individual, their agent or to the public.

An offer must be externally manifested and must be addressed to and made known to the person to whom the proposal is being made. In order to be externally manifested the manifestation shall be either express or tacit. It is however held that where a contract has to be formalised by means of a public deed or by means of a private writing, then even the offer must be made in writing. John is said to have made an offer which was externally manifested when he priced the items which he had on sale. His manifestation was therefore express.

Once a proposer makes an offer they must make such offer with the intention not only to create a legal relationship with the person to whom the offer is made to but the offeror also undertakes to hold themselves to the contract if this is accepted by the other party. An offer must also be complete and therefore contain all the elements essential for the conclusion of the contract or the contents must be such to render possible their determination. The offer made by John was also complete in that the price was clear and externally manifested to the extent that once accepted the sale was to be deemed concluded.

Finally, an offer must be made to a particular person, their agent or to the public. In the case of an offer made to the public, the other contracting party is not determinable when the offer is made but will become such when a member of the public expresses their acceptance. Offers to the public can take various forms and use various means, such as by means of catalogues or advertisements. An offer to the public can take place by means of the display of goods in shops, shop-windows, or exhibitions. Similar displays of goods constitute an offer binding the person exhibiting them if it is accompanied by an indication of the price and all other conditions of the sale. In such cases the offer is deemed to be complete even where the person exhibiting the goods does not specify the quantity available for sale. In the case under consideration therefore John made a valid offer to the public.

An offer has to be distinguished from an invitation to treat where a person is not considered to have made an offer but merely expresses themselves to be ready to consider any offers that may be made to them. Due to the completeness of the offer made as shown above, John made an offer to the public and not an invitation to treat.

(b) An offer is deemed to be of a transitory nature, in that, once the offer is accepted the offer loses its individuality in the unity of the contract. On the other hand, if the contract is not concluded the offer loses its significance and ceases to have juridical existence.

Accordingly, due to the completeness of the offer, once the priced antiques which John placed on sale constitute a valid offer to the public, John may not refuse to sell such exhibited goods to any member of the public, who accepts his offer.

A contract is said to be concluded when there is unison of wills of the contracting parties, in that, it is at that moment that an agreement acquires juridical existence. The importance of the determination of the moment in which a contract is concluded lies in the fact that until the moment of conclusion, the consent which binds the parties may be withdrawn. Until a contract is concluded the offer and existence remain two separate moments; when the contract is concluded there is unison of the offer and acceptance. Henceforth, the obligation is created.

There has been debate whether, in order for the unison of wills to be perfect, the reciprocal knowledge of the other party is necessary. The debate is therefore about whether each of the parties must come to know of the intention of the other to the extent that until this takes place the consent which binds the parties is not irrevocable.

The fact that the will of the proposer must be known to the person to whom the proposal is made to is obvious. According to the prevailing opinion in order for consent to be perfect, knowledge of the other party is necessary. A declaration that the proposal is accepted made by the person to whom the proposal is made is not enough, in that, the proposer must be informed of the acceptance. There are various theories on this matter and the latter reflects the theory of information on which our law appears to be based. It is considered that the system of information be the most correct because in order for the wills of the parties to be united it is not enough that they have been externally manifested but it is also necessary that the manifestations themselves be united implying that they must exist externally vis-à-vis the other party, which is not possible unless the acceptance is made known to the other party.

Our civil law has never specifically and directly provided for the adoption of a particular system. This is possibly due to the fact that it be presumed that the contracting parties are within close distance from one another and a contract be concluded when an offer is communicated from one party to another and the acceptance likewise communicated by word of mouth. In the case under consideration therefore the sale is deemed concluded as soon as Mrs Smith tells John that she accepts to buy the unit. John is unable to tell her that the price is not correct or that the sale is not concluded for any other reason.

10 (a) A director is said to include any person occupying the position of director of a company by whatever name they may be called, carrying out substantially the same functions in relation to the direction of the company as those carried out by a director. In view of this definition being so vague, it is therefore possible to be a director in legal terms while being described as a manager or chief executive, for example, and equally companies may describe employees as technical directors, which do not make them directors in the legal sense.

It is to be noted that the Companies Act, 1995 does not provide for a definition of a shadow director but only extends liability for certain offences to such persons in accordance with whose directions or instructions the directors are accustomed to act.

It is to be noted that our law stopped short of describing such persons and omitted the qualification existing under the UK Insolvency Act whereby a person is not deemed to be a shadow director by reason only that the directors act on advice given by them in a professional capacity. Shadow directors therefore, as opposed to *de facto* directors, shall be held liable as directors in the case of criminal offences, fraud and other offences committed by officers of the company in the course of winding up and in the case of personal liability for wrongful trading.

According to a UK text writer, the reason for introducing this concept is to prevent the people who really exercise control from sheltering behind a puppet board, while according to another text writer this concept is designed to prevent the easy evasion of legal liabilities and responsibilities through such obvious manoeuvres. Shadow directors differ from *de facto* directors because they do not purport to act as directors but on the contrary claim not to be directors and hide behind those who are.

The absence of clarity, and of a definition, have given rise to uncertainty as to who is to be considered as a shadow director. In a 1994 UK case, *Re Hydrodam (Corby) Ltd*, the question arose as to whether two directors of a parent company could be regarded as shadow directors of a subsidiary. It was here held that for someone to be a shadow director, four things had to be shown, namely (i) those who are the proper directors of the company; (ii) that the person directed the directors how to act in relation to the company; (iii) that the directors acted in accordance with his instructions; and (iv) that they were accustomed so to act.

Similarly, as held by a UK text writer, it is possible for a parent company to be considered a shadow director of its subsidiary when the level of control which it exercises is such that the directors of the subsidiary are accustomed to act in accordance with its directions. It shall therefore be a question of fact in each case to determine whether this level of control exists.

In the case under consideration, it is clear that Simon falls within the definition of a shadow director. We are told that Simon set up a company but placed his friend Matthew as director and shareholder. The implication is therefore that Matthew was only holding such posts to shield Simon in view of the prohibition which existed under the latter's contract of employment. We are also told that in carrying out all transactions, Matthew was acting on the instructions of Simon. Hence the conclusion easily reached is that Simon is fully responsible for the acts performed by Matthew in his capacity as director and cannot negate this responsibility.

(b) Disqualification orders can be considered as a measure which was introduced into our law in order to raise standards of officers of local companies rendering them more accountable for their actions.

In terms of local law, the court may, upon the application of the Attorney General or the Registrar, make a disqualification order against any person who is found guilty of an offence under the Companies Act, 1995 other than an offence punishable only with a fine, or who has infringed any requirement of the same legislation with the consequence that the person becomes liable to contribute to the assets of the company or becomes personally liable for the debts of the company.

Furthermore, the court may also issue a disqualification order where it is satisfied that the person against whom the order is being requested is or was a director of a company which, at any time has become insolvent, whether while they were a director or subsequently, and that their conduct as a director, either taken alone or taken together with their conduct as a director of any other company or companies, makes them unfit to be involved in the management of a company. Therefore, a disqualification order may be issued against any person who has committed certain criminal offences, depending on the type of punishment they are afforded, and against directors of insolvent companies who is deemed unfit to be involved in the management of a company.

Clearly, if an action for wrongful trading is taken against Simon and is successful it would be opportune for a disqualification order to be issued against him. This not only because Simon committed the offence of wrongful trading to the detriment of the creditors of ABC Limited but moreso because he made use of his friend Matthew and when Matthew ended up in trouble because of Simon's irregular behaviour Simon tried to turn his back on his friend by denying his involvement in the company. Furthermore, we know that Simon set up ABC Limited and transacted through it in violation of the conditions of his contract of employment.

(c) In terms of Simon's contract of employment, he was prohibited from carrying out any business deemed to be in competition with that of the employer. It is clear from the given facts that Simon knew that what he was doing through ABC Limited was in contravention of the terms of his employment as otherwise he would not have used his friend as a front. If action is taken against Simon and such action is successful, his employer would have sufficient evidence supporting its claim that the contract of employment was infringed. The next question to be asked is whether this infringement could be deemed to be a good and sufficient cause to terminate the employment relationship.

Reference would have to be made to the terms of the actual contract of employment given that the law does not provide what constitutes a good and sufficient cause for termination of employment. From the facts given, it appears that the contract specifically prohibited the transactions which Simon entered into through ABC Limited, which would lead one to conclude that the employment relationship may be so terminated.

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for essay based questions where there will often be more than one definitive solution.

1 The question asks candidates to demonstrate their knowledge on human rights protection in Malta, in particular, with reference to the European Convention Act, 1987.

6–10 Answers will provide a thorough explanation of the primary legislation covering the protection of human rights and fundamental freedoms in Malta with reference to the provisions of the European Convention Act, 1987.

3–5 Answers in this band will provide less detail than the answers earning marks in the higher band.

0–2 Poor answers giving very little detail on the subject matter.

2 The question deals with contract law, in particular to two internal requisites for a valid contract, *causa* and subject matter.

8–10 Full detail given on both internal requisites.

5–7 Reasonable treatment of the questions giving less detail than in the above band.

0–4 Unbalanced answer merely dealing briefly with either of the two requisites.

3 This question requires candidates to explain the concept of part-time employment.

6–10 Thorough explanation of the conditions provided for in relation to part-time employment.

0–5 Weaker answers showing little or a scanty explanation of the said conditions.

4 This question requires candidates to explain the distinction between partnerships and companies.

5–10 Detailed answers to the question with candidates explaining the essential features of both partnerships and companies.

0–4 Weaker answers providing less detail.

5 The purpose of this question is to test the candidates' knowledge on an essential characteristic of limited liability companies, namely the limited liability enjoyed by the shareholders of a company. Marks will be awarded depending on the level of detail given and the reference made to supporting case-law and text-writers.

6 The question deals with capital requirements under the Companies Act, 1995. The question requires candidates to explore the procedure to be followed when the issued share capital is decreased.

5–10 Thorough explanation of all the capital requirements, the procedure to be followed when the shareholders of a company wish to reduce the share capital of the company, reference to the documents required in order to place the said reduction into effect.

0–4 Weaker answers providing less detail on the procedure for a reduction in capital.

7 This question seeks to test the candidates' knowledge on the promoter of a company. Since this area of company law is not statutorily provided for candidates are expected to make reference to overseas case-law and statutes and the opinions of text-writers in support of their arguments.

7–10 Answers must make specific reference to the role and duties of a promoter in adequate detail.

4–6 A sound understanding of the subject area in less detail.

0–3 No or very little knowledge of the subject area.

8 This question tests the candidates' knowledge on an offence found under the Companies Act, 1995 that of wrongful trading.

7–10 Candidates awarded such marks will have a sound knowledge of the offence, when it is deemed committed, by whom, who may bring forward a claim and the punishment awarded for such offence.

4–6 Candidates show that they are aware of the relative legal provisions but do not provide sufficient detail covering all the points mentioned above.

0–3 Candidates demonstrate poor knowledge of the subject area covered.

9 The question deals with offer and acceptance as requirements for the completion of a contractual relationship.

7–10 Candidates earning these marks will deal in detail with what is required to have a valid offer and acceptance.

4–6 Reasonable information given on the said requisites.

0–3 Very brief answer given.

10 The question deals with two aspects of company law, the concept of the shadow director and the power vested in the law to issue a disqualification order against a defaulting officer. Marks will awarded on the basis of the candidates' ability to relate the provisions of the Act to the questions posed. Marks will be awarded not only on the candidates' ability to refer to the relevant provisions of the law but also on their ability to put forward arguments in favour and/or against their conclusions.